IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 8811 of 2002

For Approval and Signature:

HON'BLE MR.JUSTICE K.S.JHAVERI

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

R.M. SHAH

Versus

UNITED INDIA INSURANCE CO. LTD

Appearance:

1. Special Civil Application No. 8811 of 2002

MR VM PANCHOLI for Petitioner No. 1

MR PV NANAVATI for Respondent No. 1

MR VIBHUTI NANAVATI for Respondent No. 1

CORAM : HON'BLE MR.JUSTICE K.S.JHAVERI

Date of decision: 02 - 05/07/2004

ORAL JUDGEMENT

1.1 The petitioner, by way of this petition, has

challenged the decision of the respondent - Insurance Company, whereby, a penalty of reduction in the basic pay by eighteen steps in the time scale applicable to the petitioner was imposed and the petitioner was ordered to be placed at the bottom of the scale in Grade I and the period during which the petitioner was under suspension was ordered to be treated as "period not spent on duty".

2.1 The broad facts of the case are that the petitioner was appointed as a Development Inspector in the respondent - Company in the year 1974. While the petitioner was working as a Development Inspector in the respondent - Company, a chargesheet came to be issued against the petitioner by the Competent Authority of the respondent, on the ground that the petitioner had failed to maintain absolute integrity, devotion to his duty and had acted in a manner which was highly unbecoming of a Public Servant, by committing gross misconduct, in as much as, that the petitioner had demanded and accepted bribes.

2.2 On the basis of similar type of allegation, as mentioned above, an F.I.R. being R.C. 11/91-A for offences punishable under the Prevention of Corruption Act, 1988, was registered against the petitioner. The petitioner has not received any information from the C.B.I. or from the respondent or from any Court about the said case till today. It is also submitted by the petitioner that on similar set of facts, the C.B.I. had also filed another F.I.R. being R.C. 16/91-A, for offences punishable under the Prevention of Corruption Act, 1988, for having disproportionate assets to his known source of income.

2.3 After the investigation was over, when the case was before the learned Special Judge, Ahmedabad for trial, the Investigating Officer filed his report for the closure of the case, on the ground of insufficient evidence for launching prosecution. The learned Judge accepted the request of the Investigating Officer and the investigation was closed by order dated 13/10/92.

3.1 It is the case of the petitioner that no material was found against the petitioner and though the C.B.I. had not launched any prosecution against the petitioner, departmental inquiry was initiated against him. A Memorandum of the charges framed against the petitioner was issued on 10/02/92 and the respondent appointed Shri Y.K.Sharma, P.S.I., C.B.I., as the Presenting Officer in the said departmental inquiry.

3.2 It is also the case of the petitioner that when the departmental Inquiry Officer was changed, the petitioner had given an application dated 19/05/93, wherein, he had stated that the Presenting Officer appointed by the respondent was a very competent and legally trained Officer of the C.B.I., and therefore, in the interest of natural justice, the petitioner should be given an opportunity to defend his case through an Advocate.

3.3 It is also the case of the petitioner that since the inquiry was not conducted for a long time, the petitioner had sent letter dated 20/02/98 requesting to expedite the matter. Again, a reminder was sent on 11/05/98 requesting to expedite the matter. Ultimately, the inquiry was re-started by letter dated 02/07/98. The Presenting Officer presented his case on 04/12/98 at Annexure 'F' to the petition and the petitioner replied vide reply dated 19/01/98 at Annexure 'G' to the petition. The petitioner further submitted his representation dated 10/02/2000 and after considering the inquiry report of the Inquiry Officer, which was produced along with the affidavit-in-reply at Annexure 'P' to the petition and after issuing Notice to the petitioner, the Regional Manager, Disciplinary Authority, imposed the aforesaid penalty.

3.4 The petitioner had earlier preferred S.C.A.No.7305/1993 against the order of suspension and for dropping the Domestic Inquiry against him. In that petition, he had prayed that the inquiry against the petitioner may not be proceeded further, until he is provided with a reasonable opportunity to defend himself through an Advocate. The said S.C.A. came to dismissed by this Court by order dated 9th March 1994 and the issue of prayer (b) in the petition was not decided. Therefore, the petitioner has also sought the said prayer (b) of the earlier S.C.A. in this proceeding.

4.1 Mr.V.M.Pancholi learned advocate for the petitioner has argued that the departmental proceedings initiated against the petitioner is required to be quashed on the following grounds;

(i) that the petitioner was deprived of defending himself through an Advocate;

(ii) that one of the witnesses who had deposed as a management witness, had imposed the aforesaid penalty, which is the subject matter of challenge in this petition;

(iii) that there is no evidence against the petitioner and the whole report is based on assumptions and presumptions; and, that there is no evidence of demand and acceptance of bribe by the petitioner;

(iv) and, that the order of penalty is a double penalty, in as much as, the petitioner is deprived of salary of approximately nine years and three months, by treating him as "period not spent on duty" and also reducing salary of 18 increments.

4.2 It is true that the petitioner had preferred the earlier petition (i.e. S.C.A.No.7305/1993), but, the issue of engaging Advocate as defence assistant was not decided in the said S.C.A.. Therefore, Mr.Pancholi for the petitioner has submitted that not allowing the petitioner to take the assistance of an Advocate amounts to depriving the petitioner to defend his case properly.

4.3 Mr.Pancholi for the petitioner has contended that the order dated 30/06/2000 was passed by one Mr.D.M.Chhajed, who was acting as the Disciplinary Authority of the respondent, at the relevant point of time. The said Disciplinary Authority, Mr.D.M.Chhajed, had given statement before the C.B.I. against the petitioner in the said criminal case. Further the said Mr.D.M.Chhajed had also given deposition as management witness in the departmental proceedings against the petitioner. Therefore, Mr.Pancholi has contended that the person who has direct / indirect interest in the departmental proceedings and who had given deposition as a management witness against the petitioner, was himself the Judge, who had decided the quantum of punishment. Therefore, the respondent had violated the principles of natural justice.

5.1 Mr.Pancholi has drawn my attention to the inquiry report and has submitted that the complainant had stated that he had tendered bribe. But there is nothing on record to show that the petitioner had accepted the same. Apart from that, the incident had not taken place in the office of the respondent Company. In fact, a trap was laid at the office premises of the wife of the petitioner and the C.B.I. found the alleged bribe amount in the hands of his private peon employed in the office. Witness, Mr.C.M.Parmar, who was declared to be hostile, has not supported the allegations as alleged by the Company. If we look at the complaint, the inquiry report

and the proceedings, it is alleged that the shop of the complainant was burnt on 30/10/90 and the first installment of the bribe i.e. Rs.2,000/- was paid on 06/11/90 and the second i.e. Rs.500/- on 21/11/90. Subsequently, on 02/04/91 an amount of Rs.2,539/- was paid for assisting the complainant in getting his claim sanctioned.

5.2 Mr.Pancholi for the petitioner has submitted that the case against the petitioner is concocted, in as much as, the total bribe amount (Rs.2,000 + Rs.500 + Rs.2,539) is calculated exactly at 10% of the total claim i.e. Rs.50,390/-. He contended that no person is expected to take bribe for an odd amount as alleged against the petitioner. Thus, due to bias on the part of the Officer, the petitioner has been victimized. Therefore, Mr.Pancholi submitted that there was no evidence against the petitioner and the alleged penalty has been imposed on the ground of assumption and presumption.

6.1 Mr.P.V.Nanavati learned advocate for the respondent - Company has submitted that looking to the grave charges levelled against the petitioner, the penalty imposed on the petitioner is just and proper. He has submitted that no prejudice is caused to the petitioner by rejecting his application for engaging an Advocate, in as much as, the Presenting Officer was not a legally trained Officer; and that Mr.V.G.Popat who was deputed to assist him as a Defense Assistant was an equally competent person.

6.2 Mr.Nanavati submitted that there was no bias as alleged, in as much as, Mr.D.M.Chajjad who was, at the relevant point of time, the Divisional Officer, had deposed only on the procedural aspects of the case and not on any other point.

6.3 He has contended that as the petitioner had failed to maintain absolute integrity, devotion to duty and had acted in a manner which was highly unbecoming of a Public Servant by committing gross misconduct, in as much as, by demanding and accepting bribes, a statement of imputation of misconduct, in support of the charges framed against the petitioner, was also issued against the petitioner.

6.4 Mr.Nanavaty has submitted that the factum of tendering and collection of bribe was proved and looking to the position held by the petitioner, the reputation of the respondent Company was also damaged. Therefore, he contends that no interference is called for by this Court

under Article 226 of the Constitution of India.

7.1 Mr.V M Pancholi learned advocate for the petitioner has drawn my attention to a decision of the Apex Court in the case of The Board of Trustees of the Port of Bombay V. Dilipkumar Raghavendranath Nadkarni and Ors., reported in AIR 1983 SCC 109. The following observations at page 111 are relevant and they are reproduced for ready reference as follows;

> "I should have thought, therefore, that when a man's reputation or livelihood is at stake, he not only has a right to speak by his own mouth. He has also a right to speak by counsel or solicitor."

7.2 Mr.Pancholi for the petitioner has also relied upon a decision in the case of J.K.Agarwal V. Haryana Seeds Development Corporation Ltd. reported in A.I.R. 1991 SC 1221. Para 5 of the said decision is relevant and hence, it is reproduced for ready reference as follows;

> "On a consideration of the matter, we are persuaded to the view that the refusal to sanction the service of a lawyer in the inquiry was not a proper exercise of the discretion under the rule resulting in a failure of natural justice; particularly, in view of the fact that the Presenting Officer was a person with legal attainments and experience. It was said that the appellant was no less adept having been in the position of a Senior Executive and could have defended, and did defend, himself competently; but as was observed by the learned Master of Rolls in Pett's case that in defending himself one may tend to become "nervous" or "tongue tied". Moreover, appellant, it is claimed, has had no legal back ground. The refusal of the service of a lawyer, in the facts of this case, results in denial of natural justice."

8.1 In that view of the matter, Mr.Pancholi has requested that in the present case also, relying on the aforesaid decision, the Court should exercise the writ jurisdiction in favour of the petitioner.

8.2 Mr.Pancholi has drawn my attention to the fact that the Disciplinary Authority, Mr.D.M.Chhajed, who was the Regional Manager and also a management witness and who had confirmed the statement recorded on 11/07/91, had

after about three months from the date of bribe alleged to have been taken by the petitioner, tried to give evidence against the petitioner. Thus, the Disciplinary Authority who was a witness had acted against the petitioner.

8.3 Mr.Pancholi has also relied upon a decision in the case of Badrinath V. Government of Tamil Nadu and Ors. reported in (2000) 8 SCC 395, wherein, it has been observed that in view of the said litigation between the Officer and the appellant, the Officer's participation in the Screening Committee and his giving a decision adverse to the appellant did make out a case of real likelihood of bias against the Officer concerned and vitiated the recommendations of the Screening Committee.

8.4 Another decision of the Apex Court which was relied upon by the learned advocate for the petitioner was in the case of Amar Nath Chowdhury V. Braithwaite & Co. and Ors. reported in A.I.R. 2002 SC 678. Para 5 & 6 of the aforesaid decision are relevant which reads as under;

"5. One of the arguments raised by Shri P.P.Rao, learned Senior Counsel appearing on behalf of the appellant, is that the order of removal having been passed by the Disciplinary Authority - Shri S.Krishnaswami, who was then the Chairman-cum-Managing Director of the Company, was disqualified to have presided over and participated in the deliberation of the meeting of the Board which heard and dismissed the appeal and, therefore, the order of the Appellate Authority was vitiated on account of legal bias. We find substance in the argument. It is not disputed that Shri S.Krishnaswamy was then the Chairman-cum-Managing Director of the company. It is also not disputed that Shri Krishnaswami was also the Disciplinary Authority who passed the order of removal against the appellant. The question, therefore, arises whether the proceedings of the Board was vitiated on account of participation of the Disciplinary Authority while deciding the appeal preferred by the appellant."

Ultimately, the Apex Court observed that

fair play demanded that Shri Krishnaswami, the then Chairman-cum-Managing Director of the Company, ought not to have participated in the deliberations of the meeting of the Board when

the Board heard and decided the appeal of the appellant.

8.5 Mr.Pancholi has also placed reliance on a decision of the Apex Court in the case of Ratan Lal Sharma V. Managing Committee, H.S.S & Ors. reported in (1993) 4 SCC 10, wherein, in para 11 it is held as under;

"11.... If a person has a pecuniary interest, such interest, even if very small, disqualifies such person. For appreciating a case of personal bias or bias to the subject matter the test is whether there was a real likelihood of a bias even though such bias has not in fact taken place. De Smith in his Judicial Review of Administrative Action, (1980) at page 262 has observed that a real likelihood of bias means at least substantial possibility of bias. In R. v. Sunderland Justices it has been held that the Court will have to judge the matter as a reasonable man would judge of any matter in the conduct of his own business. In R. v. Sussex Justices it has been indicated that answer to the question whether there was a real likelihood of bias depends not upon what actually was done but upon what might appear to be done. In Halsbury's Laws of England, 4th Edn., Vol.2, para 551, it has been indicated that the test of bias is whether a reasonable intelligent man, fully apprised of all the circumstances, would feel a serious apprehension of bias. The same principle has also been accepted by this Court in Manak Lal v. Dr Prem Chand. This Court has laid down that the test is not whether in fact, a bias has affected the judgment; the test always is and must be whether a litigant could reasonably apprehend that a bias attributable to a member of the tribunal might have operated against him in the final decision of the tribunal. It is in this sense that is is often said that justice must not only be done but must also appear to be done."

8.6 In the present case, there is not dispute that Mr.D.M.Chhajed who had passed the order of penalty, was the disciplinary authority as well the management witness. Therefore, the said Authority was in a position to impress upon the inquiry report. Under the circumstances, the conclusion of the inquiry report can be said to be biased, in view of the fact that the Competent Authority has deposed against the delinquent. Therefore, the proceedings here are vitiated.

8.7 In my opinion, in view of the observations in Ratan Lal Sharma's case (supra), it is clear that the Disciplinary Authority who was present at the time of

inquiry and who was working in the same office, might have some bias or grudge against the petitioner. He being the Disciplinary Authority, he can impress upon the inquiry report. Therefore, keeping in mind the overall picture of the inquiry proceedings, delay and the disproportionate penalty imposed on the petitioner the contention raised by Mr.Pancholi deserves to be accepted.

9.1 Mr.Pancholi has also relied upon a decision in the case of State of Gujarat V. Vinubhai Maganlal Thakker reported in 1991 (2) G.L.H. 42. The following observations at page 52 of the decision are relevant;

> "There is no manner of doubt that in the departmental proceeding, strict requirement of proof, as in the case of a criminal trial, is not necessary and on a broad view of the matter, a reasonable inference can be drawn on the basis of the evidence adduced in the proceeding. In the instant case, however, there is no evidence whatsoever on the basis of which an inference can be reasonably drawn that the Deputy Collector was present at the time of preparation of the unsigned report and/or he had prepared a false panchnama, contrary to the said unsigned report, with full knowledge. There is also no evidence whatsoever, from which any reasonable inference can be drawn that a bribe of Rs.500/- was offered to him. If a Mamlatdar accepts a bribe and does not complete the first panchnama and thereafter, when the Deputy Collector comes the panchnama is prepared, there cannot be any occasion to have a reasonable inference that the second panchnama was prepared at the instance of the Deputy Collector by accepting bribe to show a favour to the shop-owner."

> "But, if there is no evidence whatsoever, on the basis of which even a reasonable inference of fact can be drawn, and the finding tests purely in the realm of surmise and conjecture, then the law is well settled by the Supreme Court that the requirement of evidence cannot be substituted by surmise and conjecture. Suspicion cannot be permitted to take the place of the requirement of proof or evidence in support of the department's case. If the finding has been made on pure surmise and conjecture, in the absence of any evidence whatsoever, such finding must be held to be perverse and not sustainable in law. In such circumstances, the writ Court

will be justified to interfere."

10.1 On the point of disproportionate penalty, Mr.Pancholi for the petitioner has relied upon a decision in the case of Bhagat Ram V. State of H.P. and Ors. reported in (1983) 2 SCC 442, wherein, it has been observed that it is equally true that the penalty imposed must be commensurate with the gravity of the misconduct, and that any penalty disproportionate to the gravity of the misconduct, would be violative of Article 14 of the Constitution.

10.2 Mr.Pancholi has also relied upon a decision in the case of O.P.Gupta V. Union of India and Ors. reported in (1987) 4 SCC 328. Relevant observations can be gathered from para 15 of the said decision which are reproduced for ready reference as follows;

"An order of suspension of a government servant does not put an end to his service under the government. He continues to be a member of the service in spite of the order of suspension. The real effect of the order of suspension as explained by this Court in Khem Chand V. Union of India is that he continues to be a member of the government service but is not permitted to work and further during the period of suspension he is paid only some allowance - generally called subsistence allowance - which is normally less than the salary instead of the pay and allowances he would have been entitled to if he had not been suspended. There is no doubt that an order of suspension, unless the departmental inquiry is concluded within a reasonable time, affects a government servant injuriously. The very expression 'subsistence allowance' has an undeniable penal significance. The dictionary meaning of the word 'Subsist' as given in Shorter Oxford English Dictionary, Vol.II at p.2171 is "to remain alive as on food; to continue to exist". "Subsistence" means - means of supporting life, especially a minimum livelihood. Although suspension is not one of the punishments specified in Rule 11 of the Rules, an order of suspension is not to be lightly passed against the government servant. In the case of Board of Trustees of the Port of Bombay V. Dilipkumar Raghavendranath Nadkarni the Court held that the expression 'life' does not merely connote animal existence or a continued drudgery through life. The expression 'life' has a much wider meaning.

Suspension in a case like the present where there was no question of inflicting any departmental punishment prima facie tantamounts to imposition of penalty which is manifestly repugnant to the principles of natural justice and fair play in action."

11.1 Mr.P V Nanavaty learned advocate appearing for the respondent has relied upon a decision in the case of Patel Filters Ltd. V. Barkatbhai V. Narsindani and Anr. reported in 2000 41(1) G.L.R. 562, wherein, it has been observed that a delinquent has no unqualified and unrestricted right of being defended by a Lawyer during a Domestic Inquiry, except when the peculiar facts of the case may require the engagement of a Lawyer.

11.2 He has also relied upon a decision in the case of The Board of Trustees of the Port of Bombay V. Dilipkumar Raghavendranath Nadkarni and Ors. reported in AIR 1983 SC 109, more particularly he has relied upon Para 9 of the said decision which reads as under;

"We concerned ourselves in this case with a narrow question whether where in such a disciplinary enquiry by a domestic tribunal, the employer appoints Presenting-cum-Prosecuting Officer to represent the employer by persons who are legally trained, the delinquent employee, if he seeks permission to appear and defend himself by a legal practitioner, a denial of such a request would vitiate the enquiry on the ground that the delinquent employee had not been afforded a reasonable opportunity to defend himself, thereby vitiating one of the essential principles of natural justice."

12.1 Mr.Pancholi for the petitioner, in the alternative, has submitted that if this Court is not inclined to quash the inquiry proceedings on the ground of "non-assistance by a Lawyer" or on the ground of "no evidence" or on the ground of "no bias", then, the penalty may be reduced as the penalty imposed on the petitioner is disproportionate to the gravity of the charge and also because the petitioner was imposed with a double penalty, inasmuch as, he was placed in the scale of 18 steps below the time scale and has also been treated as on "period not spent on duty" as a second penalty. Therefore, he contends that if the Court is not inclined to accept the contentions raised by the petitioner, then appropriate penalty may be imposed on the petitioner.

13.1 Looking to the facts and circumstances of the case, this Court could have allowed the respondent to hold an inquiry afresh or could have directed the Disciplinary Authority to take a fresh decision in the case. But, in view of the fact that the petitioner has already retired and the incident is of the year 1990, no fruitful purpose could be achieved by remanding the matter back for inquiry afresh. This Court could have substituted the penalty by imposing a minor penalty, but, such exercise is not permissible under Article 226 of the Constitution in view of law laid down by the Apex Court. Therefore, in the interest of justice, the appropriate order would be to quash and set aside the order of penalty on the grounds of bias and no evidence referred to hereinabove.

13.2 In the present case, the learned advocate for the respondent is not able to prove the case of acceptance of bribe by the petitioner. Moreover, the participation of the Disciplinary Authority in the departmental proceedings has created bias against the petitioner coupled with the fact that the petitioner was not allowed to be represented by an Advocate. All these facts call for interference by this Court under Article 226 of the Constitution of India.

13.3 For the foregoing reasons, this petition is allowed. The orders of penalty at Annexure 'J' dated 30/06/2000, at Annexure 'L' dated 23/02/2001 and at Annexure 'N' dated 08/11/2001 to the petition are quashed and set aside. The respondent - Company is directed to compute and pay all the consequential benefits to the petitioner. Rule is made absolute accordingly with no orders as to costs.

(K. S. Jhaveri, J.)

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